No. 87-6026

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HEATH A. WILKINS,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Missouri

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

REPLY BRIEF OF PETITIONER

INTRODUCTION

In reviewing the arguments presented in Respondent, State of Missouri's brief, Petitioner was struck most by what was not included. Although Petitioner intends to reply to the arguments raised in Respondent's brief, two facts essential to a resolution of the issue before the Court were not addressed by Respondent and should be noted.

The first is the fact that death is different.

> The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. It is unique, finally in its absolute renunciation of all that is embodied in our concept of humanity.

Furman v. *Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring). The second is the fact that children are different. Children are not not simply "young adults". Children are inherently different "from adults in their capacity as agents, as choosers, as shapers of their own lives" *Thompson* v. *Oklahoma*, ___ U.S. ___, 108 S.Ct. 2687, 2693 (1988) (plurality opinion).

Petitioner submits that the question before this Court, whether a 16 year old child may be constitutionally subject to the death penalty, cannot be answered without some consideration of those two fundamental facts. To attempt to do so leads to the sort of fallacious reasoning found in Respondent's brief where the "ordeal of judgment", *Trop* v. *Dulles*, 356 U.S. 86, 104 (1958), is reduced to a simple tallying process.

The underlying question this Court must address is whether Heath Wilkins, or any 16 year old child, is capable of acting with the degree of culpability and moral

blameworthiness necessary to invoke society's response that he has forfeited "his moral entitlement to live." *Spaziano* v. *Florida*, 468 U.S. 447, 469 (1984) (dissenting opinion of Stevens, J., Brennan, J., and Marshall, J.).

THE EXECUTION OF 16 YEAR OLD CHILDREN OFFENDS OUR EVOLVING STANDARDS OF DECENCY

All of the objective indicators of contemporary standards of decency support the conclusion that the execution of someone for a crime he committed at the age of 16 is always cruel and unusual. Respondent implicitly acknowledges this by its failure to provide the Court with any "strong counterevidence . . . that a national consensus against this practice does not exist." *Thompson*, 108 S.Ct. at 2707 (O'Connor, J., concurring). Instead, Respondent attacks the relevance and/or reliability of each objective indicator presented by Petitioner. Respondent argues that all of the indicators of contemporary standards of decency should be ignored by the Court,[1] with the exception of legislative enactments.

Respondent is thus arguing that the Court should abandon its well established Eighth Amendment analysis which requires that the Court's judgment be "informed by objective standards to the maximum possible extent." *Coker* v. *Georgia*, 433 U.S. 584, 592 (1977) (plurality

[1] Jury verdicts, (Resp. Br. 32 "it is difficult to view punishment verdicts as an 'objective' indicator of evolving standards of decency"); Professional Organizations (Resp. Br. 36 "it has nowhere been explained how the view of individual interest groups are reliable 'objective factors'"); Laws of other nations (Resp. Br. 38 "it is truly perilous for this Court to abstract the societal mores of other nations, individually or collectively"); and Treaties (Resp. Br. 41 "these agreements are at least irrelevant and at most evidence that no national consensus exists.")

opinion). The objective evidence presented by Petitioner is necessary for the careful consideration the Court must give to "the reasons why a civilized society may accept or reject the death penalty in certain types of cases." *Thompson*, 108 S.Ct. at 2691 (plurality opinion). The relevance of each has already been recognized by this Court. *Thompson*, 108 S.Ct. 2687.

The actions of prosecutors in not seeking death sentences against 16 year olds and of juries in not sentencing 16 year olds to death are particularly relevant because "a lack of interest on the part of the public in sentencing certain people to death, indicate(s) that contemporary morality is not really ready to permit the regular imposition of the harshest of sanctions in such cases."[2] *Thompson*, 108 S.Ct. at 2692 n.7. (plurality opinion). This reluctance is amply supported by the statistics of how small a percentage of death row inmates committed their crimes at age 16 or younger. Their numbers continue to dwindle. As of August 1, 1988, there were 2,110 people on death row, only 5 (or 2%) of whom are currently under sentence of death for crimes committed at age 16 or younger. NAACP Legal Defense and Education Fund, Inc., Death Row, U.S.A.1 (August 1, 1988).

Even if this Court were to adopt Respondent's argument and look solely to legislative enactments, the conclusion would be the same. Executing people for crimes they committed as children is no longer acceptable.

[2] Respondent's attempt to draw some analogy between the number of women on death row and the number of children on death row is flawed (Resp. Br. 32), see also *Thompson*, 108 S.Ct. at 2718 (Scalia, J., dissenting). Adult women are no longer considered less competent than men whereas children are generally regarded as being less competent than adults.

Respondent places a great deal of weight on the action of legislatures in determining our current standards of decency (Resp. Br. 18). In its analysis Respondent takes exception to the methods employed, and the results reached, by the plurality and concurring opinions in *Thompson*. First, Respondent disputes the relevance of considering states which have no current death penalty statute (Resp. Br. 20). Contrary to Respondent's assertion (Id.), this Court has always included in its Eighth Amendment analysis a determination of how many jurisdictions authorize the death penalty for a particular offense or class of offender. See e.g. *Tison* v. *Arizona*, ___ U.S. ___, 107 S.Ct. 1676, 1685-86 (1987); *Edmund* v. *Florida*, 458 U.S. 782, 792 (1982) ("only about a third of American jurisdictions would ever permit a defendant who somehow participated in a robbery where a murder occurred to be sentenced to die"); *Coker* v. *Georgia*, 433 U.S. at 596 ("Georgia is the sole jurisdiction in the United States at the present time that authorizes a sentence of death when the rape victim is an adult woman."). States which do not authorize the death penalty under any circumstance are, therefore, relevant and necessary to determine how many jurisdictions would permit the execution of 16 year olds.

Next, Respondent argues that the plurality and concurring opinions in Thompson were wrong to disregard the 19[3] states which do not expressly set minimum ages at which a child may be executed. (Resp. Br. 23-25). Respondent's thesis is that "this Court's examination of objective indicators for 'evolving standards of decency'

[3] As noted by Respondent, Vermont no longer has a death penalty, 13 Vt. Stat. Ann. Section 2303(a) (Cum. Supp. 1988) and therefore the number of these jurisdictions is now 18 (Resp. Br. 20 n.15).

must rely upon presumptions," (Resp. Br. 21) and that "it is implausible (to say the least) to suggest that a legislature which enacted a law permitting the criminal prosecution of juveniles as adults failed to contemplate that these individuals might thereby receive a sentence of death" (Resp. Br. 22). If Respondent's argument is correct, then this Court must presume that the Florida legislature contemplated and fully intended that six year old children could be executed in their state. Not only does the Florida transfer statute, Fla. Stat. Ann. Section 39.02(5)(c)(1) (Supp. 1988), make the execution of a six year old child theoretically possible, it does so without providing the child with a "rebuttable presumption that he is not mature and responsible enough to be punished as an adult."[4] See *Thompson*, 108 S.Ct. at 2712 (Scalia, J., dissenting). Since every member of the Court, as well as Respondent, agrees that such a situation would be unconstitutional, *Thompson*, 108 S.Ct. at 2695 (plurality opinion); at 2706 (concurring opinion); at 2714, 2718 (dissenting opinion) (Resp. Br. 17), the only supportable presumption is that the Florida legislature did not intend

[4] 1. A child of any age charged with a violation of Florida law punishable by death or by life imprisonment shall be subject to the jurisdiction of the court as set for in Section 39.06(7) unless and until an indictment on such charge is returned by the grand jury. When an indictment is returned, the petition for delinquency, if any, **all** be dismissed. The child **shall** be tried and handled in every respect as if he were an adult.

a. On the offense punishable by death or by life imprisonment . . . .

* * * *

If the child is found to have committed the offense punishable by death or by life imprisonment, the child **shall** be sentenced as an adult."

Fla, Stat. Ann. Section 39.02(5)(c) (Supp. 1988). (Emphasis added).

this result. Courts do not presume that legislatures intentionally pass unconstitutional laws.

Justice O'Connor's call for affirmative and unequivocal evidence of a State's desire to execute 16 year olds is reasonable. Missouri's response that this Court should presume such evidence on the basis of juvenile transfer statutes[5] should, once again, be rejected.[6]

A MINIMUM AGE FOR EXECUTIONS CAN BE SET BY THIS COURT IN THE EXERCISE OF ITS JUDGMENT, INFORMED AND SUPPORTED BY OBJECTIVE EVIDENCE.

Respondent also argues that although there is some age below which "executing a youthful defendant would always be 'indecent'" (Resp. Br. 17)[7], this age cannot be located by this Court because to do so would be to draw a "bright line" where none exists. (Id). In *Thompson*, every

[5] Respondent also points to the "statutes which specifically acknowledge the link between the defendant's age and the appropriateness of capital punishment" by including age as a statutory mitigating factor as evidence of legislative intent to permit the execution of children (Resp. Br. 25). The inclusion of age as a mitigating factor however, says nothing about the minimum age at which a child may constitutionally be executed. Age as a mitigating factor "is a constitutional requirement made mandatory by the Supreme Court in *Lockett* v. *Ohio*, 438 U.S. 586, 604 (1978). It is not a matter of legislative discretion and so cannot be said to reflect legislative attitudes." C.M. Hill, Can the Death Penalty Be Imposed on Juveniles: The Unanswered Question in *Eddings* v. *Oklahoma*, 20 Crim. L. Bull. 5, 13 (1984).

[6] For a discussion of the danger of such presumptions, see E. Lane, Legislative Process and Its Judicial Renderings: A Study in Contrast, 48 U. Pitt. L. Rev. 639, 657 (1987).

[7] Respondent has chosen "some point in the age range between ten and thirteen" (Resp. Br. 17).

member of the Court agreed that because there "is some age below which a juvenile's crimes can never be constitutionally punished by death," it is the Court's duty to locate that age. *Thompson*, 108 S.Ct. 2706 (O'Connor, J., concurring opinion). Therefore, Respondent's position that no "bright line" can be drawn has already been rejected by this Court. The question now becomes where to draw that line.

Overwhelming and undisputed evidence establishes that children are less mature than adults.[8] Additionally, the consensus among experts is that "[m]any of the psychological and emotional changes that an adolescent experiences in maturing do not actually occur until the early 20s." *Amici Curiae* brief of The American Society For Adolscent Psychiatry and the American Orthopsychiatric Association at 4 and citations therein. Therefore, setting seventeen as the age below which a child can never be constitutionally subject to the death penalty would be conservative.[9]

Respondent asserts that before this Court can justify a choice of any age as the constitutional minimum for the death penalty, it must be shown that there is a "uniform chronological age of maturity" (Resp. Br. 44). Obviously, no such showing is possible. Children do not grow at a

[8] For a discussion of the psychological and emotional differences between adolescents and adults, See *Amici Curiae* brief of The American Society for Adolescent Psychiatry and the American Orthopsychiatric Association at 3-8; See also *Amici Curiae* brief of the American Baptist Churches et. al. at 38-50 and *Amici Curiae* brief of The Child Welfare League of America et. al at 14-18.

[9] Petitioner agrees with the position taken by all of the amici that 18 is the more appropriate age below which to prohibit executions. However, Heath Wilkins was 16 years old at the time of the offense, therefore Petitioner limits himself to a discussion of 16 year olds.

uniform rate. While Petitioner agrees that there are children of every age who are mature beyond their years, Petitioner recognizes that these few "exceptionally mature" children are just that, exceptions. Law is not based on exceptions. Contrary to Respondent's assertion (Resp. Br. 44), chronological age is the best predictor of maturity. The basic principle that children, as a class, are less mature than adults, underlies every law which restricts the rights and responsibilities of people on the basis of age. See Appendix H, Petitioner's Brief; see also *Thompson*, 108 S.Ct. at 2701-2706, Appendices A through F. Respondent refuses to acknowledge

> the experiences of mankind, as well as the long history of our law, recognizing that there are differences which must be accommodated in determining the rights and duties of children as compared with those of adults. Examples of this distinction abound in our law: in contracts, in torts, in criminal law and procedure, in criminal sanctions and rehabilitation, and in the right to vote and to hold office.

Thompson, 108 S.Ct. at 2692 (plurality opinion) quoting *Goss* v. *Lopez*, 419 U.S. 565, 590-591 (1975) (Powell, J., dissenting).

Respondent counters "the shibboleths offered by petitioner regarding the thought processes of 'juveniles'" by turning to an examination of the facts of Heath's case. (Resp. Br. 45). Based on the testimony Heath gave at his guilty plea hearing (Tr. 126, 128), and in the confession he gave on the day of his arrest (Tr. 219-220), Respondent asserts that Heath's actions were neither impulsive nor emotional. Respondent cites, as fact, Heath's testimony that "he had planned to kill any and all witnesses to his robbery 'a week or two' before he committed that crime" (Resp. Br. 45-46). Based on that "fact", Respondent

argues that Heath engaged in precisely the kind of cost-benefit analysis that the plurality in Thompson found "virtually nonexistent" in those under 16 years of age. (Resp. Br. at 46 citing *Thompson*, 108 S.Ct. at 2700). Respondent's argument has three major flaws. First, in his confession, Heath said that he had made up his mind to "kill everyone who had ever made fun of [him]" (Tr. 219). He did not mention any intention to eliminate witnesses. Second, Heath first enunciated the "witness elimination" rationale for his crime after he had decided to seek the death penalty. Third, and most important, the trial judge did not find the "witness elimination" aggravating circumstance argued by the prosecution (Tr. 292-293).[10] Respondent thus chooses "facts" to support its argument which the fact finder never found to exist. Respondent also ignores the overwhelming evidence of Heath Wilkins' impulsivity, emotionalism and psychopathology. (See e.g. Tr. 22-25, 31-32, 234-236, 237, 272-273, 289-298; J.A. 16, 34, 41-43, 49).

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[10] Respondent asserts that the "witness elimination" aggravating circumstance, Mo. Rev. Stat. Section 565.032.2(12) (Supp. 1984) "was inapplicable to the present case under any construction of the facts" (Resp. Br. 12 n.7). That is not true. The Missouri Supreme Court has broadly construed the language of the "witness elimination" aggravating circumstance to include cases in which robbery victims were killed to prevent them from becoming witnesses in any future judicial proceeding. See e.g. *State* v. *Foster*, 700 S.W.2d 440, 445 (Mo. banc 1985), *cert. denied*, 476 U.S. 1178 (1986); and *State* v. *Gilmore*, 661 S.W.2d 519, 522 (Mo. banc. 1983). Had the trial judge believed that Heath had "an express preexisting plan . . . to kill anyone and everyone he found at Linda's Liquors and Deli to eliminate potential witnesses," *State* v. *Wilkins*, 736 S.W.2d 409 (Mo. banc 1987), *cert. granted*, ____ U.S. ____, 108 S.Ct. 2896 (1988) (J.A. 93), he had ample precedent for finding the "witness elimination" aggravating circumstance.

MISSOURI DID NOT ADEQUATELY CONSIDER HEATH'S MATURITY OR MORAL BLAMEWORTHINESS BEFORE SENTENCING HIM TO DEATH

Respondent asks the Court to decline to review Petitioner's argument concerning the process which resulted in Heath Wilkins' death sentence.[11] In *Thompson*, every member of the Court agreed that the propriety of the death penalty for juveniles depends on a consideration of the child's maturity and moral responsibility. *Thompson*, 108 S.Ct. at 2698 (plurality opinion); at 2708 (concurring opinion); and at 2712 (dissenting opinion). In its brief, Respondent states that "Heath Wilkins was not selected at random off the street to receive this penalty" but rather was given "individualized consideration as to whether he should be prosecuted as an adult." (Resp. Br. 30). Therefore, asking the Court to review the "individualized consideration" afforded Heath is essential to a determination of the constitutionality of his death sentence.

Petitioner's examination of what actually occurs when the State of Missouri sentences a child[12] to death serves another important and relevant function. It provides a stark example of how casually the State of Missouri takes this Court's repeated admonitions that children are not adults, and that age is critically important in determining criminal liability.

Respondent asks the Court to presume that if left to the states, only the most "exceptionally mature" 16 year olds

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[11] Heath is not attacking his certification for trial as an adult. (Resp. Br. 47-48). As Respondent points out, that issue was never raised in state court, *Heath* v. *Alabama*, 474 U.S. 82, 86-87 (1985).

[12] Heath Wilkins was a child when he committed his crime. Mo. Rev. Stat. Sec. 211.021 (1986). Every 16 year old sentenced to death in this country is, by law, a child. See Appendix A to this brief.

will be sentenced to death (Resp. Br. 42-45). This hypothesis does not withstand scrutiny. Heath's experience illustrates that the State of Missouri is unwilling to give any meaningful "individualized consideration" of maturity and moral blameworthiness to the children it seeks to execute. Heath Wilkins' age was not afforded the sort of careful consideration this Court has indicated is necessary to justify a death sentence. See e.g. *Eddings* v. *Oklahoma*, 455 U.S. 104, 116 (1982); *Skipper* v. *South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 1676, (1986) (concurring opinion of Powell, J., Burger, C.J., and Rehnquist, J.).

Respondent disputes this, calling Petitioner's assertion that Heath's age was irrelevant in the state courts "astoundingly frivolous" (Resp. Br. 48 n. 38). As support, Respondent cites the statute which makes age a mitigating factor, Mo. Rev. Stat. Sec. 565.032.3(7) (1986) and the opinion of the Missouri Supreme Court (*Id.*). Respondent does not explain how its bare recitation that age was considered as a mitigating factor is relevant to a determination that Heath's maturity and moral blameworthiness were carefully considered. As to the Missouri Supreme Court's consideration of these factors, the four sentences devoted to them are as follows:

> The trial judge clearly indicates that he considered mitigating factors in addition to defendant's age in the required trial report. Defendant was 16 years and seven months old when he murdered Nancy Allen. He was 17 years and four months old when he pleaded guilty. He had completed nine years of education and had an intelligence quotient of 105.

Wilkins, 736 S.W.2d at 415 (J.A. 89-90). This reality belies Missouri's claim that it seeks the power to execute only the "exceptionally mature" 16-year-old murderer.

Based on all of the objective indicators of our evolving standards of decency, as well as the social scientific evidence concerning the psychological and emotional development of 16 year old children, the only justified response is to remove them from the class of those the state may constitutionally execute.

CONCLUSION

Petitioner respectfully requests this Court to reverse the judgment of the Missouri Supreme Court insofar as it affirmed the death sentence in this case, vacate the death sentence and grant such other relief as it deems appropriate.

Respectfully submitted,

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APPENDIX

APPENDIX A
AGE OF MAJORITY

State	Age	Citation
AL	19	Ala. Code Sec. 26-1-1 (1986)
AK	18	Alaska Stat. Sec. 25.20.010 (1983)
AZ	18	Ariz. Rev. Stat. Ann. Sec. 1-215(2) (1987)
AR	18	Ark. Stat. Ann. Sec. 9-25-101(a) (1987)
CA	18	Cal. Civil Code Sec. 25.1 (West 1987)
CO	18	Colo. Rev. Stat. Sec. 13-22-101 (1987)
CT	18	Conn. Gen. Stat. Ann. Sec. 1-1d (1988)
DL	18	Del. Code Ann. tit. 1, Sec. 701 (1985 Repl.)
DC	18	D.C. Code Ann. Sec. 30-401 (1981)
FL	18	Fla. Stat. Ann. Sec. 743.07 (West 1986)
GA	18	Ga. Code Ann. Sec. 74-104(a) (Supp. 1988)
HI	18	Haw. Rev. Stat. Sec. 577-1 (1985 Repl.)
ID	18	Idaho Code Sec. 32-101 (1983)
IL	18	Ill. Ann. Stat. ch. 110 1/2 para. 11-1 (Smith-Hurd Supp. 1988)
IN	18	Ind. Code Ann. Sec. 34-1-67-1(6) (Burns 1986)
IA	18	Iowa Code Ann. Sec. 599.1 (West 1981)
KS	18	Kan. Stat. Ann. Sec. 38-101 (1986)
KY	18	Ky. Rev. Stat. Ann. Sec. 2.015 (Michie/Bobbs-Merrill 1985)
LA	18	La. Civ. Code Ann. art. 29 (West Supp. 1988)
ME	18	Me. Rev. Stat. Ann. tit. 1, Sec. 72 (1979)
MD	18	Md. Ann. Code art. 1, Sec. 24 (1981)
MA	18	Mass. Gen. Laws Ann. ch. 4, Sec. 7 Cl. fifty-first (West 1986)
MI	18	Mich. Stats. Ann. Sec. 25.248(2)(b) (Cum. Supp. 1987)
MN	18	Minn. Stat. Ann. Sec. 645.45 (West Cum. Supp. 1988)
MS	21	Miss. Code Ann. Sec. 1-3-27 (1972)

AGE OF MAJORITY (Continued)

State	Age	Citation
MO	—	Not Uniform
MT	18	Mont. Code Ann. Sec. 41-1-101 (1987)
NE	19	Neb. Rev. Stat. Sec. 38-101 (1984)
NV	18	Nev. Rev. Stat. Sec. 129.010 (1987)
NH	18	N.H. Rev. Stat. Ann. 21:44 (1987 Cum. Supp)
NJ	18	N.J. Stat. Ann. Sec. 9:17 B-3 (West Supp. 1988)
NM	18	N.M. Stat. Ann. Sec. 28-6-1 (1987) (Repl.)
NY	—	Not Uniform
NC	18	N.C. Gen. Stat. Sec. 48A-2 (1984)
ND	18	N.D. Cent. Code Sec. 14-10-01 (1981)
OH	18	Ohio Rev. Code Ann Sec. 3109-01 (Baldwin 1983)
OK	18	Okla. Stat. Ann. titl. 15, Sec. 13 (West 1983)
OR	18	Or. Rev. Stat. Sec. 109-510 (1987)
PA	21	Pa. Stat. Ann. tit. 1 Sec. 1991 (Purdon 1988)
RI	18	R.I. Gen. Laws Sec. 15-12-1 (1981)
SC	18	S.C. Const. art. XVII, Sec. 14 (as amended 1975)
SD	18	S.D. Codified Laws Ann. Sec. 26-1-1 (1984)
TN	18	Tenn. Code Ann. Sec. 1-3-105(1) (1985)
TX	18	Tex. Fam. Code Ann. Sec. 11.01(1) (Vernon 1986)
UT	18	Utah Code Ann. Sec. 15-2-1 (1986)
VT	18	Vt. Stat. Ann. tit. 1 Sec. 173 (1985)
VA	18	Va. Code Ann. Sec. 1-13.42 (1987)
WA	18	Wash. Rev. Code Ann. Sec. 26.28.010 (1986)
WV	18	W. Va. Code Ann. Sec. 2-2-10(aa) (1987)
WI	18	Wis. Stat. Ann. Sec. 990.01(3) (1986)
WY	19	Wyo. Stat. Sec. 14-1-101 (1986)